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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 206

In the Matter
of
ALFRED M. ROGERS,
Bankrupt.

FLORENCE HILLS ROGERS,
Petitioner,

—against—

SOLOMON RAFFE, Trustee in Bankruptcy of Alfred M. Rogers,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

SAMUEL M. CHAPIN,
Counsel for Petitioner.

RALPH H. WIENER,
Of Counsel.

THE COURT PRESS, 130 Cedar Street, N. Y. C.

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(a) The Referee in bankruptcy has no jurisdiction summarily to determine the adverse claim of a third party and

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OTHER AUTHORITY CITED:

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Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

To the Honorable the Chief Justice and to the Associate Justices of the Supreme Court of the United States:

Your petitioner, Florence Hills Rogers, respectfully submits this petition for a writ of certiorari for the purpose of bringing up to this court for review a decision of the United States Circuit Court of Appeals for the Second Circuit, decided on March 29, 1944, and reported in 141 Fed. (2d) 374 (637-648).* A petition to said Circuit Court

* References in parentheses, unless otherwise indicated, are to folios of printed record on appeal.

of Appeals for the Second Circuit for a rehearing (649-669) was denied without opinion on May 23, 1944 (673-675), and on May 24, 1944, said Circuit Court entered an order for mandate affirming the order of the District Court for the Eastern District of New York (682-684).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240-A of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., Section 347A).

Summary Statement of Facts, the Proceedings and the Decisions Below.

Pleadings.

Solomon Raffe, trustee in bankruptcy of Alfred M. Rogers (hereinafter referred to as the "Trustee") brought on before Charles Wells Brown, a referee in bankruptcy (hereinafter called the "Referee") of the United States District Court for the Eastern District of New York, a summary turnover proceeding to compel the petitioner herein and the bankrupt (petitioner's husband) and the Equitable Life Assurance Society of the United States (hereinafter called the "Insurance Company") to turn over to the Trustee a certain policy of insurance on the bankrupt's life. The Trustee's petition in the turnover proceeding alleged: That the bankrupt had filed a voluntary petition in bankruptcy on November 17, 1939, on which date he had been adjudicated a bankrupt (12); that on May 2, 1926 the Insurance Company had issued an ordinary life insurance policy, No. 40706077,* in the amount of $25,000, upon the life of the bankrupt, in which

* This policy, for convenience, will hereinafter be referred to as "077". Another policy, No. 40706076, which also figures in the case, will hereinafter be referred to as "076".

the petitioner herein had been named as beneficiary; that the policy had been issued upon the written application of the bankrupt, and that it was in full force and effect on November 17, 1939, the date of adjudication, at which time it had a cash value of approximately Nine thousand ($9,000.00) Dollars (12-13).

The petition also stated (14):

> "That the bankrupt was, at the time of the filing of the petition in bankruptcy herein, and still is, the owner of said policy of insurance."

Nowhere in the petition was it alleged that the bankrupt, at the time of filing the petition in bankruptcy, had had *possession* of the policy.

The petitioner herein appeared specially, contesting the jurisdiction of the Referee (17). Her verified answer denied the Trustee's allegations as to the bankrupt's ownership of the policy and as to the vesting in the Trustee of the right to obtain the cash surrender value (18-19). In her answer she stated that "prior to the filing" of the bankrupt's petition she (19)

> "acquired title to said policy of insurance from the said bankrupt for a valuable consideration, and that for many years prior to the filing of the petition for adjudication herein by the said bankrupt,"

she had paid the premiums on the policy; that she had had, and still retained, physical possession thereof, and that on or about May 10, 1937 (thirty months prior to the filing of the petition in bankruptcy) she had "paid off a substantial loan on the security of the said policy" (20). In her answer, petitioner also contested the jurisdiction of the bankruptcy court over the policy or its proceeds, expressly declaring that she did "not consent" to such jurisdiction of the controversy, pointing out that the Trustee's proper remedy lay in a plenary suit (21-22).

The bankrupt also filed a verified answer in which he denied being the owner of the policy at the date of the petition in bankruptcy, and denied that the Trustee had become vested with title to the policy or the right to the cash surrender value thereof (24). Furthermore, he alleged that he had "assigned, transferred and delivered" the policy to the petitioner herein, who had paid the annual premiums thereafter (26); that on May 10, 1937 (thirty months prior to the date of the filing of the petition in bankruptcy) the petitioner herein had repaid to the Insurance Company a loan of $7,268.05 which was then outstanding against the policy (27); and that (27)

> "ever since the transfer and assignment of said policy of insurance to Florence Hills Rogers, he has had no interest therein or title thereto and the same is the sole property of the said Florence Hills Rogers."

Finally he too denied that the Referee could properly assume summary jurisdiction in the case (28).

The Evidence Adduced Before the Referee of the Adverse Claim of the Petitioner Herein.

The policy in question, 077, was produced at the hearing before the Referee by the attorney for the petitioner herein (40) after the bankrupt's attorney had stated it was not in the bankrupt's possession (39).

Having several times voiced their objections to the jurisdiction of the Referee on the ground that the Referee had no power to retain jurisdiction summarily to determine, in a turnover proceeding, the controversy as to ownership of policy 077, since petitioner's claim of ownership of said policy was adverse as distinguished from colorable, which objections were rejected by the Referee (37-38, 283-285), the attorneys for petitioner herein called her as a witness. She testified that she had had possession of policy 077 (288) and that such possession had dated from two or three days before the occasion, during

the month of April 1937, when she went to the Insurance Company's office to arrange to pay off a loan on said policy (293-294). She testified that she had had continuous possession of the policy ever since April 1937, and had kept it in her vault at the New Rochelle Trust Company (294-295). Relating the circumstances under which she had obtained policy 077, the petitioner herein testified that her husband had physically turned it over to her in April 1937 when he found it impossible to pay the premiums himself; it was arranged that she should "adjust" the policy and carry it (300-301). At that time the cash surrender value of 077 was $7,525, but the outstanding loan on said policy was $7,268.05, leaving a total net value of only $501.70, even after taking into account a dividend due (174-175).

On May 10, 1937 (70-71) Mrs. Rogers paid off the said loan of $7,268.05 on policy 077 to the Insurance Company through a cash surrender transaction on another policy, 076 (70-71), on the life of the bankrupt, which policy had been in her possession as assignee-owner since 1928 (110-112). She testified that on surrendering her policy 076 for the purpose of deriving funds with which to pay off the loan outstanding on 077 she physically delivered 077 to the Insurance Company (302-303). Petitioner testified that at the conclusion of the transaction whereby she surrendered 076 to pay off the loan on 077 the latter policy had been returned to her by the Insurance Company (304). Thereafter she had continually kept policy 077 in her possession (304-305). She testified further that thereafter she had paid the premiums on policy 077 (305) and identified four of her checks (305; Resp. Exhs. 8A-8D inclusive, reproduced in record at page 147) drawn on her own personal account as having been in payment of those premiums.

The petitioner maintains an individual account in the New Rochelle Trust Company in her own name (235). This account had been transferred out of a joint account in the names of the bankrupt and the petitioner on Sep-

tember 29, 1936, the credit balance in said joint account, in the amount of $2,901.72, being then placed in the petitioner's account (236-8). The joint account, which lasted from October 30, 1926 to September 29, 1936, with power to either party as signatory (238) had itself been, in turn, a successor to the petitioner's own individual account which dated back to June 1912 (272).

The petitioner testified that the bankrupt had never made any deposits in, or withdrawals from the New Rochelle Trust Company account when it was in the joint names of the bankrupt and herself (312-313). There was also testimony by the manager of the said Trust Company that an examination of the joint account and of the prior individual account of the petitioner, undertaken at the request of counsel for the Trustee, had revealed no checks drawn by the bankrupt on either account (273-274).

On cross examination the petitioner herein testified that policy 077 had been kept in her New Rochelle Trust Company vault which she had maintained for about thirty years (314). The bankrupt had never used this vault for his personal purposes, and he had entered the vault only in company with her (315). She testified that this vault contained her own matters and not those of her family (317-320).

The assistant Registrar of the Insurance Company testified to the receipt from the petitioner herein of a letter dated April 5, 1938 to the effect that premium notices on 077 should be sent to her, and that she would "take care of same" (138-139; Resp. Exh. 10B, Record, at p. 149). This letter was written by the petitioner shortly prior to May 2, 1938, which was the anniversary date of the policy (p. 1 of Trustee's Exh. 1, Record, p. 123) and the first date during her ownership on which a premium payment would be due. The officer of the Insurance Company also testified that, although the form authorizing the application in 1936, the year *prior* to the assignment, of the current dividend on 077 to the payment of the premium then due, was signed by the *bankrupt* as "owner" (177-

178, 446; Resp. Exh. 11), similar forms relative to the 1939 and 1941 dividends had been signed by the *petitioner* herein as "owner" (178-181, 447-448; Resp. Exhs. 12, 13). The Company applied the dividends as requested by the petitioner in said years. He also testified that although, according to the Insurance Company's records, the bankrupt was "considered" the owner of 077 on or about May 2, 1939 (193-194), and had the authority to apply for a loan and make application for its surrender value (197-198), *the Insurance Company would require the physical delivery of the policy before paying out the surrender or loan values* (199).

There was evidence introduced before the Referee which, it was claimed, tended to contradict the petitioner's claim of ownership of 077. However, as shown *infra*, evidence militating against the merits of petitioner's claim is not material to a determination of the existence of an adverse claim.

On a consideration of all the evidence pro and con, the Referee saw fit to disbelieve the proof of petitioner's ownership. Having determined the issue of ownership on conflicting evidence in favor of the Trustee, the Referee, in effect, held that by reason of such determination on the merits, the claim of petitioner was "colorable", and being merely colorable, the Referee could properly retain jurisdiction in the turnover proceeding summarily to order a surrender of the claimed policy.

The Referee having overridden all objections by the Insurance Company, the bankrupt and the petitioner herein of his assumption of summary jurisdiction, rendered his decision on February 25, 1942 to the effect that the policy should be turned over to the Trustee (452-70), implementing this decision with an order on March 2, 1942, directing the bankrupt and the petitioner herein to turn over policy 077 to the Trustee and to execute all necessary papers to enable the Insurance Company to pay the cash surrender value of $9,270.70 to said Trustee (471-478). The petitioner filed a petition to review the

Referee's order (479-93) which was dismissed on June 17, 1942 by an order (520-524) of Judge Abruzzo of the District Court for the Eastern District of New York with an opinion (511-519). On July 2, 1942 petitioner filed a notice of appeal to the Circuit Court of Appeals for the Second Circuit, which Court, on March 29, 1944 handed down a decision affirming with an opinion (637-648) (reported in 141 Fed. (2d) 374) the decision of the District Court. On May 23, 1944 the Circuit Court of Appeals denied, without opinion, a petition for rehearing (674). On May 24, 1944 said Court entered an order for mandate affirming the order of the District Court (684).

In the petitioner's brief hereto appended (pp. 20-21) it is shown to be the general rule in the various circuits (except that by the decision below in this case it is no longer the rule in the Second Circuit) that in determining whether or not he has summary jurisdiction to order a turnover, a Referee in bankruptcy may conduct a hearing only to a point where it appears that the respondent is making a claim adverse to the Trustee, supported by testimony, which, if true, would make the claim valid. The Referee may not weigh testimony against testimony to determine where the truth lies. That function is reserved to the finders of the facts at a plenary trial.

The correct test as laid down in the case of *In re Yorkville Coal Co.* (C. C. A. 2d Cir. 1914), 211 Fed. 619, 621, which represented the law applied in all circuits (including the Second Circuit prior to the decision in the case at bar by the Circuit Court Appeals of the Second Circuit) is as follows:

> "The basis of an adverse claim is disclosed by the testimony when it is of such a nature that, if submitted in a court and no evidence is offered in contradiction, it would be sufficient to support a judgment in favor of the claimant."

In the case at bar the decisions of the Referee, the District Court and the Circuit Court of Appeals all confirm

the summary jurisdiction of the Referee on the specious reasoning that the petitioner's claim was "colorable". However, a mere reading of the recital of facts as set forth in the opinions of the Referee (453-470), the District Court (511-519) and the Circuit Court of Appeals (640-648) shows that the petitioner's claim was clearly "adverse" within the test that "if submitted in a court and no evidence is offered in contradiction, it would be sufficient to support a judgment in favor of the claimant". Each of said decisions reveals that the Referee had weighed conflicting testimony and other proof, found certain evidence to be true and certain evidence not to be true, and determined on the merits that the petitioner had not sustained her burden of proving ownership of the policy. Both the District Court and the Circuit Court of Appeals treated the decision of the Referee with the sanctity accorded to a solemn judgment of a Court, holding that since the conclusion arrived at by the Referee on the merits of the controversy was not clearly erroneous, the Referee's decision would not be disturbed. The District Court and the Circuit Court both accorded mere lip service to the rule that a Referee has no jurisdiction to determine a controversy between a Trustee and a third party presenting an adverse claim. Said rule prevailing in other circuits was tortured by the holdings below that since the Referee's conclusion from the testimony that petitioner was not the owner, was supported by the record, the petitioner's claim was, therefore, *ipso facto* "colorable" and hence the Referee had jurisdiction summarily to proceed to a determination of the controversy.

The following excerpts from the opinions below indicate conclusively that the alleged finding by the Referee that petitioner's claim was "colorable" is a clear misnomer for what was patently a determination by the Referee on the merits, based on conflicting testimony, that the petitioner had not sustained her (alleged) burden of proof

by a fair preponderance of the credible evidence. The Referee in his decision said, in part:

> "This (referring to testimony adduced by the Trustee and tending to contradict the petitioner's testimony), taken together with the other testimony herein, leads me to the conclusion that the claim * * * must be disregarded * * * the assignment (of the policy) is based entirely upon the parol testimony of Mrs. Rogers. And what is more, is not supported by any corroboration whatsoever (456). * * * There was no proof presented to me to show that Mrs. Rogers requested the insurance company to note on their records that she was the owner of the policy (459). * * * All the testimony of Mrs. Rogers concerning the so-called oral assignment, possession and ownership of the policy stands entirely alone without corroboration and with the bankrupt absent from court (462). * * * Even assuming that there may be a valid oral assignment of an insurance policy, the burden is upon Mrs. Rogers to establish it by a fair preponderance of believable evidence (465). * * * I find that the claim of Mrs. Rogers is colorable and without substance and subject to the summary power of this court (469)."

In its opinion the District Court for the Eastern District, in dismissing the petition to review the determination of the Referee, made the following statements with respect to the merits of the controversy:

> "The trustee claims that Mrs. Rogers, wife of the bankrupt, paid the premiums on the life insurance policy in question out of the money obtained in surrendering the $50,000 policy for its cash value. The testimony discloses that at least some of the premiums were paid or could have been paid out of that fund. There is some confusion as to the bank accounts held by Mrs. Rogers. * * * The referee was of the opinion that these funds were apparently being held by her as agent for her husband. The referee found that there had been no oral assignment of the policy; that the bankrupt was the owner of same (515). * * * In his order of March 2, 1942, the referee directed

payment of the cash surrender value of the policy to the trustee. His decision upon which the order was based contains a resume of the testimony offered before him together with his findings on that testimony. The referee was amply justified in arriving at his conclusions. The court concurs in the referee's findings (517). * * * The petitions for review are dismissed and the order of the referee of March 2, 1942 is affirmed."

By concurring in the Referee's findings, the District Court's decision generated a novel doctrine of federal law, to wit, that as the Referee's conclusion, based upon the presentation to him of contradictory testimony, was "amply justified" by evidence sufficient to support his judgment, the claim of the petitioner herein was "colorable and without substance and subject to the summary power" (469) of the Referee.

The following excerpts from the opinion of the Circuit Court of Appeals for the Second Circuit show that the "colorableness" of the claim of a third party claimant, under the rule of the decision below, follows as a natural course whenever there is sufficient evidence in the record to support the Referee's conclusion on the merits of a controversy involving a contested issue of fact:

"The appellant was the only witness who testified in support of her claim of ownership of the policy by oral assignment. * * * It appeared that for a time her husband did have joint access with her to the safety box in which the policy was kept, but whether or not that was so up to the time of his adjudication was uncertain. * * * the failure of her husband to testify in corroboration of her claim was explained only by her own testimony * * *. Obviously the appellant was an interested witness whose credibility was to be determined in the light of all the circumstances. The referee before whom she testified as to the oral assignment under which she claimed was not satisfied that the premiums she paid by checks were in effect paid out of her own funds in view of what was shown as to her financial relations with her

> husband. Furthermore, her unexplained failure to notify the insurer of the assignment of the policy * * * was a circumstance which he properly thought should be considered in connection with her testimony.
>
> The district judge likewise concluded that her evidence of the oral assignment could not be taken at face value, and we cannot say that the conclusion was clearly erroneous. That being so, the policy remained the property of the bankrupt, since no assignment of it was proved. As the appellant's claim in these proceedings was thus shown to be merely colorable, the summary jurisdiction of the court was properly invoked and exercised."

The Circuit Court's statement in its opinion that "since no assignment of it was proved" the policy remained the property of the bankrupt, indicates that the Circuit Court was approving of the decision of the Referee that in a turnover proceeding brought by a Trustee against a third party claimant the burden of proving ownership was on the claimant (and this notwithstanding the fact that in such a proceeding the claimant was the respondent or defendant and had possession of the policy).

The petitioner presents this petition because of the importance of the federal question involved and for the reason that the decision below has created a conflict in the various Circuit Courts of Appeals as to the definition of the word "colorable" within the meaning of the rule that where the claim of a claimant is "colorable" as distinguished from "adverse" a Referee in bankruptcy has jurisdiction summarily to order a turnover. Thus, in various circuits other than the Second Circuit the rule is accepted as established that (a) once the claim of a third party is shown to be adverse the referee has no jurisdiction to proceed with a hearing, but the merits of the claim can be determined only in a plenary suit brought before a court, and (b) where a claim is colorable (or not adverse to the trustee) the referee has summary power to order the claimant to turn over to the trustee the prop-

erty colorably claimed. By federal rule of law enunciated by various Circuit Courts of Appeals, it is held, and under former decisions handed down by the Circuit Court of Appeals for the Second Circuit it had been held, that the test of an adverse claim is whether, if submitted in a court and no evidence is offered in contradiction, it would be sufficient to support a judgment in favor of the claimant (see brief hereto appended at p. 22). By its decision below the Circuit Court of Appeals for the Second Circuit has, in effect, redefined "colorable" claims so that a colorable claim is one which the Referee, after full hearing of a controversy, determines to be unsupported by the weight of the credible evidence. Inferentially and quite obviously, an "adverse" claim, by such decision, is restricted to (a) one which the Referee finds, after weighing the evidence, is supported by the proof, or (b) a claim which, on review by the court from a Referee's decision in favor of the Trustee, is found to be uncontradicted by any evidence whatsoever in the record sufficient to support a finding in favor of the trustee.

By such disarmingly simple expedient of redefining terms, the Circuit Court of Appeals for the Second Circuit has effected a startling revision of the powers and jurisdiction of a Referee in bankruptcy. Under its decision a Referee in bankruptcy attached to any District Court situate in the Second Circuit is not required, as he would be in other circuits, to relinquish jurisdiction in favor of a plenary suit before a court as soon as a preliminary investigation reveals that an adverse claim has been presented by the claimant, but may conduct a hearing, and by the expedient of calling "colorable" a claim founded on testimony which he is inclined to disbelieve as unsupported or contradicted by what he regards as the weight of the credible evidence, is empowered to render a summary and binding decision on the merits against the claimant. By this far-reaching change in federal law the Circuit Court of Appeals for the Second Circuit has allocated to the Referee powers hitherto universally regarded by bench and bar as reserved to the courts.

The effect of the decision below in this case was to deprive the petitioner of her constitutional right to a trial by a court and jury, since the Referee's decision on the merits, under the language of said decision of the Circuit Court, is conclusive in the event, here present, that the record contains the bare skeleton of evidence required on an appeal to support a decision involving a contested issue of fact.

Under the guise of redefinition of the terms "colorable" and "adverse" the decisions below, while giving verbal respect to the rule prevailing in other circuits that a Referee is without jurisdiction to try an adverse claim, have, perhaps unwittingly, enlarged the jurisdiction of a bankruptcy Referee so that, in controversies with third party claimants, the Referee acts not as a mere aid, but as the *alter ego* of the court.

By sheer casuistry the courts below have established a rule whereby a claimant's right to a plenary suit is foreclosed provided only that the Referee's conclusion arrived at in a summary turnover proceeding on the merits of the claim is not clearly erroneous. The ease with which such condition can be met in controversies involving contested issues of fact and credibility of witnesses is tantamount to barring a claimant's right to a plenary suit in every case.

Having found support in the record for the Referee's conclusion that the policy was not the property of the petitioner, the Circuit Court of Appeals determined that the decision of the Referee in favor of the Trustee was not clearly erroneous, and that, hence, "the appellant's claim in these proceedings was thus shown to be merely colorable" (647).

While effecting a most drastic change in the federal law pertaining to the summary powers of a Referee in a case of this kind, the opinions of the courts below purport to take respectful notice of and to agree with the rule that a Referee has no summary jurisdiction to determine an adverse claim. However, the spirit of the rule is violated, for under the rule of the courts below

hardly any claim can ever be "adverse". The courts below have created a dangerous precedent which, if allowed to stand, will mean that referees are authorized vastly to enlarge the scope of their jurisdiction in summary proceedings. Apparently a mere disinclination by a Referee to accept the testimony of an interested witness at face value is sufficient *per se* to attach finality to a finding that a claim is colorable. A by-product of the rule announced below is that every adverse claimant who turns out to be the unsuccessful litigant in a turnover controversy involving a contested issue of fact before a Referee is stigmatized as a colorable claimant. By the same token the claimant is deprived of his constitutional right to a trial by court and jury.

Under the decisions below the right of a third party claimant to a plenary trial of a controversy would be insured only in the speculative and highly unlikely event that a ruling by the Referee in favor of the Trustee rejecting the merits of the claim is held on an appeal to have been unsupported by any evidence in the record sufficient to spell out a cause of action in favor of the Trustee. Only in such remote event would the court below, under its instant decision, disturb a finding by a Referee that a claim is "colorable". Since records on appeal in controversies involving contested issues of fact, which do not contain conflicting testimony or contradictory proof, are as rare as the proverbial needle in a haystack, a conclusion against a claimant made by a Referee on the merits can rarely, if ever, be reversed as "clearly erroneous". Thus, the practical result is that the Referee is enabled to bolster his jurisdiction by merely finding, on contradictory evidence, that the claim is untenable, and, hence, "colorable".

It is for this Court to settle this important question of federal law by determining (1) whether a third party claimant does not make out an adverse claim sufficient to withdraw the controversy from the jurisdiction of a referee by merely adducing proof which, if submitted to a court and uncontradicted, would be sufficient to support a judgment in favor of the claimant, and (2) whether once a

prima facie claim is presented to the Referee supported merely by testimony of an interested witness sufficient to warrant submission to a court or jury, the claimant is entitled to a plenary trial and the Referee is required to relinquish jurisdiction and may conduct no further hearing, with a view to determining the controversy on the merits, even where it is the Referee's opinion, based on the credibility of the witness, etc., that a decision in favor of the claimant would be contrary to the weight of the credible evidence.

It is submitted that the new rule of law effected by the decisions below operates most unfairly and unjustly to a claimant. In the hearing before the Referee the petitioner herein, not anticipating that the Referee would refuse to yield jurisdiction after receiving preliminary proof of the existence of an adverse claim, necessarily was unprepared to adduce the same quantum of proof of the merits of her claim as petitioner would have undertaken to prepare to prove at a plenary trial brought on for hearing in the usual manner. The harsh effect of the rule announced below is that the claimant, at a summary hearing before a referee, brought on quickly by order to show cause, would have to be prepared on very short notice not merely to make out a preliminary showing or prima facie case of the existence of an adverse claim, but to prove such claim by the fair preponderance of the credible evidence. Such proof, naturally, entails the marshalling of all available witnesses and the collation of all relevant evidence, normally an arduous and time-consuming preparation. The difficulties imposed on a claimant and the possibilities of harassment to which a claimant is subjected in being required to prepare for a full trial of a controversy, involving hotly contested issues of fact, to be tried on short notice, are self-evident. A claimant's dilemma is accentuated by the erroneous rule announced below (465-466) putting the burden of proof on the claimant. The plight of a claimant hailed summarily before a referee is unenviable, for a refusal by a referee in a

summary proceeding to yield jurisdiction, followed by a decision dismissing the claim as colorable could never, as a practical matter, be subject to reversal, there being always enough proof in a record containing conflicting testimony to support a finding either way. By such practice a referee becomes not the arm of the court, but the court itself.

The broad, tyrannical implications of the rule announced below are that, if followed in other circuits, adverse claimants hailed into court on orders to show cause returnable on short notice before referees in bankruptcy in the various District Courts situate in the United States would be subject to the sweeping summary jurisdiction of the bankruptcy referee, contrary to and in violation of the constitutional right of adverse claimants to a trial by a court, and, where demanded, by a jury.

It is submitted that if the rulings below are allowed to go unchallenged by failure to review, on writ of certiorari, the decisions rendered below, the door will have been opened for striking down, indirectly and by sophistical reasoning, the grant of right to trial by court and jury, guaranteed by the Federal constitution.

The rule formerly followed in the Second Circuit, and still followed in other circuits (see brief appended hereto, pp. 20-22), that an adverse claimant is entitled to a plenary trial before a court and jury is as effectually abolished by labelling as "colorable" a claim disbelieved or disproved at a hearing as if the decision of the Circuit Court of Appeals below had stated in *haec verba* either that an adverse claim of a third party constitutes a controversy determinable on the merits by a Referee in bankruptcy, or that, in a controversy between a trustee and a third party brought on by a summary turnover proceeding, a Referee in bankruptcy may exercise the power and jurisdiction of a court, and his determination on the merits of such controversy has the same finality as a judgment of a court of justice and is reviewable only if his conclusion is clearly unsupported by any evidence in the record.

It is submitted that the Circuit Court of Appeals for the Second Circuit has decided erroneously an important question of federal law which should be settled by this Court. The decision below overturns an established practice in bankruptcy causes of relegating the determination of controversies between trustees and adverse claimants to plenary suit before the court. The conflict in the opinions of the respective Circuit Courts of Appeals, referred to in petitioner's brief hereto appended, should, in the interests of uniformity, be decided by this Court. There is an abundance of turnover proceedings brought on by orders to show cause before the numerous referees in bankruptcy sitting in the various District Courts for summary disposition. The decision of the Circuit Court below in this case is likely to cause future uncertainty on the question here raised for settlement by this Court. Unless corrected by this Court, the effect will be to create regrettable confusion. It is submitted that the question which this application suggests should be definitely settled.

Your petitioner presents herewith, as a part of this petition, a certified copy of the transcript of the record in the courts below, and will present its brief for consideration with this petition.

WHEREFORE, your petitioner respectfully prays that the petition for a writ of certiorari should be granted to the Circuit Court of Appeals for the Second Circuit, so that its decision affirming the order of the District Court, should be reviewed by this Court, and that your petitioner may have such other and further relief as this Court may deem proper.

Dated, June 21, 1944.

FLORENCE HILLS ROGERS,
Petitioner.

By: SAMUEL M. CHAPIN,
Counsel for Petitioner.